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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 971

BINKLEY MINING COMPANY OF MISSOURI,
Petitioner,

vs.

DAN H. WHEELER, ACTING DIRECTOR BITUMINOUS COAL
DIVISION, DEPARTMENT OF THE INTERIOR, HAROLD L.
ICKES, SECRETARY OF THE INTERIOR.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

HENRY ADAMSON,
RUSSELL BLAIR,
LLOYD C. ADAMSON,
Counsel for Petitioner.



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DAN H. WHEELER, ACTING DIRECTOR BITUMINOUS COAL
DIVISION, DEPARTMENT OF THE INTERIOR, HAROLD L.
ICKES, SECRETARY OF THE INTERIOR,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Petitioner herein respectfully presents to this Court its
Petition for Writ of Certiorari, as follows:

Jurisdiction.

1. Jurisdiction in this cause is based upon Judicial Code,
section 240, as amended by the Act of February 13, 1925,
43 Stat. 938 (U. S. C. A. Title 28, section 347) and upon

section 6(b) 50 Stat. 85 U. S. C. A. Title 15, section 836, paragraph (b) of the Bituminous Coal Act of 1937.

2. The date of the original judgment to be reviewed is February 10, 1943 (R. 118). Petition for Rehearing was filed February 25, 1943 (R. 125), within the time for filing petitions for rehearing provided by the rules of the United States Circuit Court of Appeals for the Eighth Circuit, and was denied March 5, 1943 (R. 127).

Opinions.

An opinion in the above entitled cause was written and filed by the Acting Director of the Bituminous Coal Division, Department of the Interior, and appears in the printed record filed herein at pages 107-114. An opinion was also written in the above cause by Judge Woodrough, of the United States Circuit Court of Appeals for the Eighth Circuit, Sanborn and Thomas, Circuit Judges, concurring, and was filed February 10, 1943, and appears at pages 118-121 of the record. The Court's opinion is also reported in 133 Fed. (2d), pages 872-873.

Statement.

This is a companion case to the case of *Binkley Mining Company of Missouri v. Dan H. Wheeler, Acting Director, Bituminous Coal Division, Department of the Interior, Harold L. Ickes, Secretary of the Interior*, No. 970, filed in this court at the time of filing this petition for Certiorari, and charges "wilful violation" in sales of coal made by Petitioner to Omar, Incorporated. Precisely the same action was taken in this case as in the companion case with respect to notice, setting the matter for hearing, proceedings by the Board and Petition to Dismiss and terminate the matter, denial of such petition, carrying the matter forward through counsel of the Division, taking testimony and report by the Examiner, exceptions, rules, review,

decision and final order of the Director as set forth in No. 970. Save and except the Evidence the same statutes are involved, same questions are presented as are presented in Petitioner's Petition and Brief filed in this Court contemporaneously with the filing of this petition, and numbered 970, and Petitioner respectfully requests that the statement of the matter involved, questions presented and reasons why Petition for Certiorari should be granted, as set forth in the petition and brief in said companion case No. 970 in this Court, insofar as applicable, be taken and considered in connection with this Petition for Certiorari.

Evidence.

Since the question of whether or not there was substantial evidence to support Director's conclusion that the Petitioner "wilfully" committed the violation charged in the complaint, we make the following short resume of the evidence in this cause:

Defendant, Binkley Mining Company of Missouri, is a code member operating a mine in the State of Missouri (R. 35); that Omar, Inc., is a reorganization of Omar Baking Company, and operates a baking plant in Omaha, Nebraska, and a distributing plant at Lincoln, Nebraska, and that coal is used at the distributing plant at Lincoln, Nebraska, for space heating purposes (R. 36-37). Defendant, Binkley Mining Company of Missouri, through its subsales agent, executed contract with Omar, Inc., for season's requirements of coal estimated at thirty carloads for sale of coal from the defendant's mine located at Bevier, Macon County, Missouri, for the period between the first day of April, 1940, and the 31st day of March, 1941 (R. 39); that Binkley Coal Company, in executing contract for the defendant, is the subsales agent of the Southwest Coal Company, who in turn is the sales agent or marketing agency for the Binkley Mining Company of Missouri (R. 35, 64); that the prices

fixed in the contract between the subsales agent of defendant and Omar, Inc., were for the period of April to August, \$1.79 per ton f.o.b. mine, and for the period September to March \$1.49 per ton f.o.b. mine (R. 39); that three earloads of coal under the contract were shipped to the distributing plant at Lincoln, Nebraska, on the industrial price basis (R. 46, 47, 49, 51); that Omar, Inc., did not intend to buy coal for its distributing plant at Lincoln, Nebraska, at less than the code price (R. 56); that sales representatives for the subsales agent assumed that the coal shipped to the plant at Lincoln, Nebraska, was for industrial purposes (R. 58, 59, 60); that said sales representative had no knowledge that coal shipped to the distributing plant at Lincoln, Nebraska, was to be used for space heating, and at that time did not intend to violate the code prices, and after finding out that plant at Lincoln was a distributing plant, no more coal was shipped to said plant at the industrial prices (R. 60-61); that one of the cars sent to Lincoln, Nebraska, was shipped, billed and invoiced to Omaha, Nebraska, and two cars were shipped direct to Lincoln, Nebraska (R. 65); that information was received from the sales representative of the subagent at Lincoln, Nebraska, that the Lincoln plant of Omar, Inc., only used coal for space heating, and no more coal was shipped to Lincoln plant under contract, and defendant had no intent to sell coal to Lincoln plant at less than code price (R. 66, 67, 68). Sales office of the subsales agent at Kansas City, Missouri, handles billing and taking orders for cars of coal, and hundreds and thousands of cars of coal are billed from this office (R. 69). Office manager of the subsales agent on April 23, 1941, learned that the Lincoln plant was not an industrial plant, and called the pricer of statistical department of Bituminous Coal Division at Kansas City, Missouri, about correcting prices on cars of coal billed there; that pricer told her to bill such cars in future at space heating

prices (R. 70-72, 75). There was a dispute in the evidence as to what was said in the telephone conversation between office manager of subsales agent and pricer of the Statistical Department of the Bituminous Coal Division at Kansas City, Missouri, in this: That office manager of the subsales agent at Kansas City testified that pricer of the Statistical Department of Bituminous Coal Division at Kansas City, Missouri, told her to get the space heating price in future and to forget the matter as to cars sent to Lincoln, Nebraska (R. 70). The pricer testified that he told the office manager that she would hear from the Division and did not tell the office manager to forget the matter of the cars sent to Lincoln, Nebraska (R. 76-80). He did, however, admit the telephone conversation with the office manager with reference to these cars of coal (R. 76). That subsales agent of defendant had no intention of violating any price fixed and did not intend to sell the coal to Omar, Inc., at Lincoln, Nebraska, at any less than the published code price (R. 67-68).

WHEREFORE, it is respectfully submitted that this petition should be granted and that this Court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and, upon final consideration, reverse said cause.

BINKLEY MINING COMPANY OF
MISSOURI,

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